No. 80-1260

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In the Supreme Court of the United States

OCTOBER TERM, 1980

THOMAS S. LEONHARD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether government officials, in protecting a husband, his wife, and the wife's children by a prior marriage from possible retaliation for the husband's testimony against organized crime suspects, violated any rights of the children by declining, at the mother's insistence, to reveal their new location to the natural father.

2. Whether claims against government officials based upon the separation of the natural father from the children are time-barred when the applicable limitations periods elapsed between the government's last act in assisting the relocated family and the filing of the claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-8 to A-60) is reported at 633 F. 2d 599. The opinion and orders of the district court (Pet. App. A-64 to A-75) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1980 (Pet. App. A-6 to A-7). A petition for rehearing was denied on October 24, 1980 (Pet. App. A-1 to A-2). The petition for a writ of certiorari was filed on January 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Thomas S. Leonhard, suing on behalf of himself and his three children, brought this action for damages against the United States and several of its agencies and

officials in the United States District Court for the Western District of New York.[1] Petitioner alleges that the federal respondents violated his and his children's constitutional rights and committed torts against them by separating Leonhard from his children in 1967 and by refusing to reveal their location to him (Pet. App. A-10 to A-11). Agencies of the State of New York and their officials and former officials were also named as defendants, as was an individual, Pascal Calabrese.

Leonhard and his wife Rochelle were divorced in 1966 (Pet. App. A-11). Rochelle was awarded custody of their three children; Leonhard was given visitation rights (*ibid.*). In 1967 Rochelle married Pascal Calabrese, and she and the children resided with him until he was confined to a New York state prison for robbery (*id.* at A-11 to A-12). Subsequently, Calabrese testified against organized crime suspects in a federal prosecution, after having been promised federal assistance in relocating him and his family with new identities (*id.* at A-12). Later in 1967, federal officials arranged for Calabrese to be transferred to a federal prison and for Rochelle and the children to be moved to a military base (*ibid.*). In 1968, Calabrese was paroled, and respondent Thomas A. Kennelly, a Department of Justice official, arranged for Calabrese, Rochelle, and the children to be moved to a new location and given new identities (*id.* at A-12 to A-13). Thereafter, apparently in 1968 (*id.* at A-35

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[1]Specifically, the federal respondents are the United States, the Department of Justice, former Attorney General Griffin Bell and his predecessors in office to and including John Mitchell, former Deputy Attorney General Benjamin R. Civiletti, Gerald Shur, Thomas A. Kennelly, the Marshals Service, its former Director Wayne B. Colburn and his predecessors in office to 1967, John Cameron, and five unknown agents of the Department of Justice (Pet. ii). Although petitioners purported to sue all of these federal officials in their individual, as well as official, capacities, many of these officials were not served so as to confer jurisdiction over them in their individual capacities.

n.20), the family moved on its own initiative (*id.* at A-13). At this point, Kennelly became the only person in the government to know the family's identities and location (*ibid.*).

In 1969, Leonhard's attorney contacted Kennelly, who declined to reveal the location of Rochelle and her children (Pet. App. A-13). Rochelle not only consented to Kennelly's refusal to disclose the children's location but insisted upon it (*id.* at A-13, A-45). Kennelly forwarded correspondence between Leonhard and Rochelle but Rochelle refused to allow Leonhard to see the children, even away from their new home, for fear they would reveal their new identities (*id.* at A-13). Rochelle and her children moved again in July 1970, and continued to live without government assistance after that time (*id.* at A-35 & n.20). In June 1971, a New York court entered a default judgment modifying the Leonhards' divorce decree so as to award custody of the three children to Leonhard (*id.* at A-13). Although Rochelle was not served in this action, she did learn of it, and her response was to warn Kennelly that if he revealed her location in any way she and the children would disappear without informing even Kennelly of their new location (*ibid.*).

In July 1971, Leonhard brought an action for mandamus against Kennelly and other officials of the Department of Justice seeking to compel them to disclose the location of his children. The district court denied mandamus, and the court of appeals affirmed. *Leonhard* v. *Mitchell*, Civil No. 1971-359 (W.D.N.Y. May 24, 1972), aff'd, 473 F. 2d 709 (2d Cir. 1973) (*Leonhard I*). The district court and the court of appeals found that Kennelly had acted in good faith and had not abused his discretion by honoring Rochelle's request not to reveal the location of her and her children to Leonhard. See *Leonhard I*, *supra*, 473 F. 2d at 712, 714. The district court held that the federal parties had breached no clear duty to Leonhard (see *id.* at 712), and the court of

appeals agreed, stating that it "found no violation of statutory or constitutional rights." *Id.* at 714. This Court denied certiorari. *Leonhard* v. *Richardson,* 412 U.S. 949 (1973).

In July 1975, Rochelle voluntarily contacted Leonhard, and he and the three children were reunited (Pet. App. A-15). On June 27, 1977, Leonhard and the three children filed administrative claims with the government under the Federal Tort Claims Act (*id.* at A-56). Receiving no decision on those claims, Leonhard instituted this action on June 30, 1978 (*id.* at A-15). Leonhard alleged, on behalf of both himself and his children, that the respondents violated the First, Fourth, Fifth, Ninth, and Fourteenth Amendments by separating and concealing the children from him (*id.* at A-16). On behalf of the children, Leonhard alleged that the federal respondents undertook a duty to protect the children from their step-father, Calabrese, and that they breached this duty (*ibid.*).[2]

The district court dismissed the claims against the federal respondents on the alternative grounds of res judicata, collateral estoppel, statute of limitations, failure to file timely administrative claims, failure to allege a valid claim, and qualified immunity (Pet. App. A-65 to A-70). The district court held that the finding in *Leonhard I* that the federal officials had breached no duty to Leonhard by refusing to disclose the location of his children was fatal to petitioner's present claims (*id.* at A-66, A-70).[3]

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[2]Petitioner further alleged that respondent Calabrese, who was never served and never appeared in this action (Pet. App. A-17, A-20), committed torts against the children (*id.* at A-16 to A-17). The New York respondents were alleged to have acted in concert with the other respondents in releasing Calabrese from custody in violation of state law (*id.* at A-17).

[3]The complaint was also dismissed as to all the other respondents except Calabrese (Pet. App. A-70, A-71 to A-74, A-75). The court of appeals held that the failure to dismiss the complaint as to Calabrese did not affect its appellate jurisdiction because Calabrese had not been served and had never appeared in the action (*id.* at A-20 to A-22).

The court of appeals affirmed the dismissals as to all respondents (Pet. App. A-8 to A-60). It held that Leonhard's own claims against the federal respondents were time-barred (*id.* at A-30 to A-36). The court determined—and petitioners agree (Pet. 11)—that the most nearly analogous New York statute of limitations applied and that this period was either three or six years (Pet. App. A-36). The court of appeals then stated that there were "persuasive reasons" that "implicate federal interests" for holding that the cause of action accrued when the federal officials first helped conceal the Calabrese family in 1967 (*id.* at A-33 to A-34). The court reasoned that the federal officials' initial agreement to protect the witness and his family necessarily entailed a commitment not to disclose their location for at least some period of time. Therefore, the court concluded, any wrong occurred when the federal officials first undertook to conceal the family, an event that took place far more than six years before the complaint was filed (*ibid.*).

The court of appeals held that Leonhard's claim was time-barred for another reason as well. On the basis of the complaint and Rochelle's affidavit, which petitioners submitted for purposes of this litigation (Pet. App. A-18), the court found that Rochelle and the children received no government assistance after July 1970 (*id.* at A-35 & n.20). Therefore, the last act of wrongful concealment charged by petitioners occurred in 1970, again more than six years before the complaint was filed (*id.* at A-34 to A-36).

The court of appeals also held that the children's constitutional allegations against the federal respondents failed to state a claim upon which relief could be granted (Pet. App. A-42 to A-48). The court observed (*id.* at A-45):

> The most critical fact in determining whether the rights of the children were violated is the fact that Rochelle had sole custody of them. She was the parent who had been entrusted with their care, their educa-

> tion, their health and safety. There is no question that Rochelle consented to the removal and concealment of the children, nor that they remained in her custody for the entire time that they were concealed from their father.

Moreover, there could be no doubt that the federal officials acted reasonably and in an effort both to combat organized crime and to protect the children (*id.* at A-45 to A-46). Such officials, the court said, "must be entitled to rely on the consents of the family members to be removed and concealed" (*id.* at A-46). Since the children were not of age, the officials properly relied on the fact that Rochelle, the parent who had custody, had consented for them (*ibid.*).

Finally, the court of appeals upheld the dismissal of petitioners' tort claims—principally that the federal respondents had allowed the children to be injured in various ways by Calabrese (Pet. App. A-51 to A-60). The court held that these claims might well be time-barred, in whole or in part, by the children's failure to file administrative claims within two years of the alleged tortious acts, as required by 28 U.S.C. 2401(b) (Pet. App. A-55 to A-56). In any event, the court concluded, the federal respondents had not compelled the children to live with Calabrese and had not undertaken any duty to protect the children against Calabrese (*id.* at A-57 to A-58), nor was such a duty imposed by statute (*id.* at A-52 to A-54).[4]

ARGUMENT

1. The substance of petitioners' claims is that the federal respondents violated the Constitution by interfering with the relationship between the children and their natural

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[4]The court of appeals also affirmed the dismissal as to the state respondents. It held that Leonhard's claims were time-barred (Pet. App. A-36 to A-39) and that the children's claims were barred by the Eleventh Amendment or failed to state a valid claim (*id.* at A-49 to A-51).

father. These contentions were rejected by the district court and the court of appeals in *Leonhard I*, and this Court declined to grant review. *Leonhard* v. *Richardson*, 412 U.S. 949 (1973). The district court and the court of appeals, in another thorough opinion, have again rejected the claims. There is no greater reason at this time for the Court to reconsider these holdings in this highly unusual case.

Moreover, as the courts below held, petitioners' claims are without merit. They are conclusively answered, as the court of appeals emphasized, by the fact that Rochelle, the parent who had legal custody of the children, consented to, and often insisted upon, every action by federal officials in issue here. The Leonhards' divorce, not the actions of federal officials, ruptured the relationship between Leonhard and the children. After the divorce, Rochelle, as custodian of the children, necessarily had the power to take a variety of actions that might affect the children's relationship with their natural father.

Federal officials did not require Rochelle to establish a new identity for the children, to move the children, to refuse to tell Leonhard where the children were, or to refuse to allow Leonhard to see them. On the contrary, respondent Kennelly, by forwarding mail between Leonhard and Rochelle, enabled her to put Leonhard in contact with the children at any time. The federal officials' only role was to make available to the family of a witness against organized crime the facilities that the family needed to protect itself against retaliation. As petitioners have conceded (Pet. App. A-45 to A-46), every action taken by federal officials was part of a good-faith effort to combat organized crime. It is implausible to suggest that federal officials violate the Constitution, or commit a tort, whenever they take action that has the incidental effect of allowing a divorced parent with custody of children to make it more difficult for the other parent to exercise his visitation rights.

In addition, as the court of appeals pointed out, this Court held, in *Parham* v. *J.R.*, 442 U.S. 584 (1979), that a decision by a responsible parent, if joined in by the appropriate state officials, can justify committing a child to a state mental hospital—a "more drastic intrusion" on the child's liberty than the relocation of the children in this case (Pet. App. A-47 to A-48). "[*A*]*fortiori* children have no cause to complain when their custodial parent and the government officials charged with such functions decide to protect their safety by relocating and concealing them, with their parent" (*id.* at A-48; footnote omitted).[5]

2. The courts below also correctly held that petitioners' claims are time-barred (Pet. App. A-30 to A-36, A-67).[6] The complaint, read together with Rochelle's affidavit, establishes

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[5]Petitioners' damages claims against the federal officials are also barred by immunity doctrines. The district court so held (Pet. App. A-67) and the court of appeals did not reach the issue (*id.* at A-30 n.17). This Court's decisions have "emphasized * * * that, at least in the absence of some showing of malice, an official would not be held liable in damages * * * unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation." *Butz* v. *Economou*, 438 U.S. 478, 498 (1978). If a "constitutional right allegedly violated had not been authoritatively declared at the time the * * * officials acted, the officials [are] entitled, as a matter of law, to prevail on their claim of qualified immunity." *Baker* v. *McCollan*, 443 U.S. 137, 139 (1979). In *Leonhard I*, the courts essentially declared that the rights petitioners asserted did not exist. In any event, no argument can be made that these rights were "clearly established." Federal officials' immunity against tort claims is, if anything, stronger. Compare *Barr* v. *Matteo*, 360 U.S. 564 (1959), with *Butz* v. *Economou*, *supra*, 438 U.S. at 495. Finally, the tort claims against the United States appear to be barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

[6]In addition, as the district court held (Pet. App. A-66 to A-70), Leonhard's claims are barred by res judicata or collateral estoppel. The finding in *Leonhard I* that the federal officials violated no duty to Leonhard by refusing to disclose the location of his children precludes liability under any theory Leonhard advances in this second action against the same and additional federal officers.

that the federal respondents took no action to help conceal the children after July 1970. Thus, by petitioners' own account, the wrongful conduct had ceased by that time. The complaint was filed approximately eight years later, far beyond the applicable limitations period.

For the same reasons, the courts below were correct in holding that petitioners' claims under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, are barred by their failure to file administrative claims within the two-year period prescribed by 28 U.S.C. 2401(b). The administrative claims were filed on June 27, 1977 (Pet. App. A-56), more than two years after the federal officials' last act. In addition, Rochelle and the children ceased living with Calabrese in June 1975 (*ibid.*).

Petitioners' assertion that the "federal concealment doctrine" (Pet. 15) saves their claim is insubstantial. As the case cited by petitioners, *Briley* v. *California*, 564 F. 2d 849, 855 (9th Cir. 1977), itself shows, that doctrine applies where a *claim* has been concealed from a plaintiff by a defendant's action. Similarly, in *United States* v. *Kubrick*, 444 U.S. 111 (1979), another case cited by petitioners, this Court held that a claim "accrues" within the meaning of the Federal Tort Claims Act "when the plaintiff knows both the existence and the cause of his injury." *Id.* at 113. Here, Leonhard's children may have been concealed, but his claim—and the federal officials' role—were certainly not; indeed, he sued federal officials on substantially the same claim in 1971.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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